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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-834

MORTON FUNGER, et al.,

Petitioners

v.

MONTGOMERY COUNTY, MARYLAND, et al.,

Respondents

On Petition For A Writ of Certiorari
To The Court of Appeals of Maryland

BRIEF IN OPPOSITION FOR RESPONDENT, MONTGOMERY COUNTY, MARYLAND

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CITATIONS

In The Matter of the Application of the County Council for Montgomery County, Maryland: Application No. F-947, for Amendment to the Zoning Ordinance Map, County Council for Montgomery County, Maryland, Sitting as the District Council for that Portion of the Maryland-Washington Regional District Located Within Montgomery County, Law Nos. 40639, 40661, 40663, 40665, 40666, 40667,

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OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (Appendix A of Petition) is reported at 280 Md. 686, 376 A.2d 483. The opinion of the Circuit Court for Montgomery County, Maryland, is reproduced in Appendix B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

This respondent has restated the question presented to read as follows:

When a municipal legislative zoning body, as provided by its zoning ordinance, conducts a public hearing to consider legislative facts relating to a comprehensive rezoning, must it accord cross-examination when requested by interested parties?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Applicable provisions of the United States Constitution and of the Montgomery County Zoning Ordinance are set forth in Appendix C of the Petition.

STATEMENT OF THE CASE

Although argumentative, and in some instances inaccurate, the Statement of the Case set forth in the Petition at least presents an acceptable chronology of the legislative and judicial proceedings which preceded this Petition. Respondent Montgomery County adds the following brief statement.

Not all of the properties in Friendship Heights were downzoned by the comprehensive sectional map amendment zoning action

taken by the Montgomery County Council. (P.3 of Petition.) Some properties were accorded a more intense development use by that action. Indeed, although 3.5 acres out of the 18.19 acre Bergdol Tract owned by Petitioners were downzoned, the Friendship Heights Sector Plan recommends that the entire Bergdol Tract be developed in an optional zoning classification designated PD-44 which would accord the Petitioners more density than they had enjoyed prior to the comprehensive zoning action. (Pp. 4 and 9 of Petition.)

The Bethesda-Chevy Chase Master Plan did not recommend intensification of development in Friendship Heights (P. 4 of Petition); rather it called for orderly expansion of the central business district with emphasis on the protection of surrounding singlefamily neighborhoods through the use of park buffer areas and transitional uses. Thus, the Sector Plan and Sectional Map Amendment did not reverse the essential objectives of the General Plan and Bethesda-Chevy Chase Master Plan (P. 6 of Petition); they implemented those objectives by considering all of the properties in Friendship Heights as they relate to each other and to the surrounding neighborhoods.

ARGUMENT

The petitioners contend here that constitutional due process requires a right to cross-examination in a comprehensive zoning proceeding, and particularly when, as they allege, the proceeding results in downzoning. They are attempting to lift to the level of federal constitu-

tionality a decision of the Court of Appeals of Maryland which was based upon a non-federal ground adequate to support that decision. The thorough and well-reasoned opinion of the Court of Appeals demonstrates beyond question that the petitioners' contention is without merit.

1. THE DECISION BELOW, WHICH IS BASED ON NON-FEDERAL GROUNDS, IS CLEARLY CORRECT.

The Court of Appeals of Maryland, in reversing the Circuit Court for Montgomery County in this case, decided a question that had remained unanswered since its holding in Hyson v. Montgomery County, 242 Md. 55, 217 A.2d 578 (1966). In the Hyson case, the Court of Appeals held that in a single-tract, piecemeal zoning hearing in Montgomery County, reasonable cross-examination, if requested, must be permitted. The provisions of the zoning ordinance involved in Hyson are essentially the same as involved in this case. Section 59-204 sets forth hearing procedures and Section 59-207(a) provides that a zoning application shall be decided on the basis of the evidence of record. The zoning provisions do not specifically provide for cross-examination. In Hyson, the Court reasoned that because the zoning action in question involved a single tract of land, Sections 59-204 and 59-207 required the members of the County Council to resolve disputed questions of adjudicative facts (as contra-distinguished from legislative facts) concerning particular parties; and, therefore, a reasonable right of cross-examination must be allowed. Citing 1 Davis, Administrative Law Treatise, §§ 7.02 and 7.05.

The question left unanswered by the Court of Appeals in Hyson was whether or not cross-examination must be allowed in a comprehensive rezoning hearing such as is involved in this case. The Circuit Court for Montgomery County, although it considered the zoning action of the Council to be comprehensive in this case (P. 83a of Petition), held that the Council must allow reasonable cross-examination because the same zoning ordinance hearing requirements applied and the facts elicted were adjudicatory in nature. The Circuit Court went on to say:

> ". . . this Court does not hold that the due process clause of the United States Constitution mandates the result reached. The holding that the right to cross-examine attaches is based purely upon a statutory right as construed in Hyson, supra. Sections 59-204 and 59-207 were enacted by the County Council, and they must abide by the law they enacted. . ." (Emphasis added.) (P. 109a and 110a of Petition.)

In a unanimous decision, the Court of Appeals reversed the Circuit Court pointing out that there is no express requirement in Sections 59-204 or 59-207 that a right of cross-examination must be afforded to interested persons at zoning hearings. The Court explained that Hyson implies the exis-

tence of that right in piecemeal rezoning cases which exists either as a requirement of due process or by reason of the right to a public hearing itself, because the facts to be determined are deemed adjudicative and the Council's function in that instance is quasi-judicial in nature. (P. 42a of Petition.) However, the Court of Appeals went on to resolve the question left unanswered in Hyson by pronouncing that in a comprehensive rezoning case the Council considers legislative facts designed to affect local and regional needs and all property owners within the planning area. (P. 47a of Petition.) This did not require a judicial or trial-type hearing and "there was no constitutional or other right arising from §§ 59-204 and 59-207 to cross-examine witnesses at the sectional map amendment hearings involved in this case." (P. 48a of Petition.)

It is clear that the parameters of this case and the Hyson case are quite narrow and provincial involving an interpretation of the zoning ordinance of Montgomery County. The Maryland Court of Appeals decided in Hyson that in a single-tract zoning case the Montgomery County Council is required by local law to hold a public hearing to resolve adjudicative facts which implicitly includes reasonable cross-examination, when requested, whereas in this case, which involves a comprehensive rezoning, the required hearing calls for the resolution of legislative facts and no quasi-judicial function is involved; hence, no cross-examination is required. (P. 47a of Petition) Since the decision of the Court of Appeals is based on a non-federal ground adequate to support the decision, this Court should decline to grant this petition.

II. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW NOT HERETOFORE DECIDED BY THIS COURT.

Unhappy with the decision of the Court below, the petitioners now ask this Court to revamp the requirements of due process in a legislative proceeding based on the petitioners' misreading of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S.Ct. 2358 (1976). In Eastlake, this Court held that the doctrine that a legislative delegation of power to a regulatory body must be accompanied by discernible standards does not apply to a municipal charter provision which mandated a referendum on any change to an existing land use within the municipality because, rather than being a delegation of legislative power, that charter provision constituted a power reserved by the people to themselves. The practical result is that under the provisions of the charter mandate in Eastlake, a land use change can be effectuated without any hearing at all. An unreasonable result would have the protection of challenge in state court where the scope of the state remedy available to a landowner would be determined as a matter of state law, as well as under Fourteenth Amendment standards. 426 U.S. at 677, 96 S.Ct. at 2363.

Because the land use change in Eastlake apparently did not denigrate the use or depreciate the value of the land involved in that case, the petitioners here, relying strongly on the dissenting opinions in Eastlake, urge that where a

zoning action does denigrate a use or depreciate the value of land, such as they allege to be their situation, then the landowner has a right to a hearing including cross-examination. Their argument fails for several reasons.

First of all, there really is no controversy at all because as stated above, the petitioners cannot demonstrate that their property has been denigrated in use or depreciated in value. Were they to exercise their right under the optional PD-44 use recommended in the Friendship Heights Sector Plan, they would enjoy more density of use than they had under the prior zoning category. (Pp. 67a and 68a of Petition.)

Secondly, the petitioners are not single small parcel owners who have been "spot" zoned without procedural protections such as bothered Justice Powell in his dissent in Eastlake. 426 U.S. at 680, 96 S.Ct. at 2365. They had ample notice and opportunity and indeed exercised their right at numerous and lengthy hearings before the Montgomery County Planning Board and before the Montgomery County Council to present oral and written evidence which they deemed relevant to the comprehensive rezoning of Friendship Heights. There is no indication in the dissent of Justice Powell that a landowner has a further procedural right to cross-examination even in the situation of a single tract, piecemeal rezoning.

Justice Stevens distinguishes the broad, general policies set forth in

the legislative act of comprehensive rezoning from the particular issues involved in piecemeal rezoning and places great deference in the judgment of the legislature in the former situation. 426 U.S. at 683, 684, 96 S.Ct. at 2367. With regard to a piecemeal rezoning, he indicates that fundamental fairness requires that "the interested parties be given a reasonable opportunity to have their dispute resolved on the merits by reference to articulable rules." 426 U.S. at 692, 693, 96 S.Ct. at 2371. However, nowhere in his dissent does he suggest that the rules should include crossexamination.

This Court decided the question involved in this case many years ago in Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445, 36 S.Ct. 141 (1915):

> "where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, witout giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.
>
> * * *
>
> There must be a limit to individual argument in such matters if government is to go on."

This respondent submits that the hearing requirements set forth in the Montgomery County zoning ordinance, which apply both to piecemeal and comprehensive rezoning, fall well within the ambit of Bi-Metallic and amply satisfy the fundamental fairness described by Justice Stevens in his dissent in Eastlake.

This Court recently dismissed for want of a substantial federal question a holding of the Supreme Court of California in San Diego Building Contractors Association v. City Council of San Diego, 529 P.2d 570 (1974), appeal dismissed, 427 U.S. 901, 96 S.Ct. 3184 (1976). In that case, the lower court held that a comprehensive rezoning of a prescribed coastal zone in the city of San Diego constituted a legislative enactment, and as such, there was no due process requirement to afford affected landowners notice and hearing. If there was not a due process requirement for notice and hearing in the California comprehensive rezoning case,

the petitioners in this comprehensive rezoning case, who were afforded notice and ample opportunity to present oral and written evidence at numerous hearings, have no grounds whatsoever to be claiming a further right to cross-examination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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